State of Maine

Representing Parents in Child Protection Cases

A Basic Handbook for Lawyers

April, 1999

INTRODUCTION

Child protection cases are among the most difficult any lawyer will handle in his or her career. Representing parents in child protection cases is especially challenging. Even so, once an attorney develops a good grasp of this unique field of law and practice, the work can be very rewarding. The purpose of this Handbook is to help lawyers acquire that knowledge.

The law governing child protection cases is the Child and Family Services and Child Protection Act, 22 M.R.S.A. ¤¤4001 et. seq. (hereinafter the "Act"). The Act declares that family integrity is limited by the right of a child to be protected from abuse or neglect. At the same time, the Act directs that a child be removed from the custody of their parents only when failure to do so would jeopardize her/his health or welfare. The Act gives family reunification and rehabilitation a priority, and promotes early permanent plans for a child who cannot return home. 22 M.R.S.A. ¤4003. Finally, the Act provides that parental rights may be terminated only after it is shown by clear and convincing evidence that termination is in the best interest of the child, and that at least one of four additional criteria for termination has been met. 22 M.R.S.A. ¤4055 (1)(B)(2)(a) and (b).

Jurisdiction over child protection cases rests with the Maine District Court. The court hears both Petitions for Child Protection Orders and Petitions for Termination of Parental Rights. 22 M.R.S.A. ¤¤4031 and 4050. The District Court is extremely busy, and the number of Petitions for Child Protection filed has risen steadily over the last decade. Lawyers play a significant role in shaping the cases and moving them toward resolution. For that reason it is crucial that lawyers be well versed in the law, knowledgeable about the issues, and focused on sound representation.

This Handbook is intended to assist attorneys representing parents in child protection litigation. It is designed to be a basic introduction and guide. As such it provides information about the state's child protection system, the structure of court cases, essential information about the law, and pointers on some of the unique features of child protection practice. Naturally, such a booklet cannot be exhaustive. New practitioners must understand the Act and pertinent caselaw thoroughly. As much as possible, they should attend seminars and search out law review articles (see, e.g., Myers, John E. B., Expert Testimony in Child Sexual Abuse Litigation, Nebraska L.Rev., Vol. 68 Nos. 1 & 2, 1989). Finally, new lawyers are encouraged to consult with experienced lawyers before attempting to represent parents in child protection cases on their own.

OVERVIEW

I. The Role of the Department of Human Services in Child Protection Cases

The Maine Department of Human Services (hereinafter the "Department") is the state agency mandated to investigate cases of suspected child abuse and neglect. The Department's child protection work is carried out through a number of field offices located across the state. The Department's caseworkers are divided into three general groups, each with different functions:

a) Child Protective workers investigate reports of abuse or neglect, work with families to address problems on a voluntary basis, and file Petitions for Child Protection in court when that action is necessary;

b) Children's Services (sometimes known as "Substitute Care") workers are responsible for caring for children who have been placed in foster care. They also are required to assist parents in their efforts to rehabilitate and reunify the family; and,

c) Adoption workers attend to the children who have been freed for adoption, and work to find adoptive homes.

A child protection case usually starts with a phone call to the Department's Central Intake Unit, reporting a child suspected of being abused or neglected. Although all citizens are encouraged to report child abuse, there are certain classes of people who must report. These "mandated" reporters include teachers, medical personnel, child care workers and many other professionals. 22 M.R.S.A. ¤4011.

When the Department receives a referral (and it receives thousands every year) a Central Intake caseworker evaluates the case and either refers it to the proper field office for investigation or "screens it out" as inappropriate for further Departmental investigation. Many such "screen outs" are referred to community service providers who may assist the family. For those cases which are not "screened out," the Department has several options. It may assess and close the case; it may work with the family on a voluntary basis to reduce abuse or neglect; and/or it may file a Petition for Child Protection at the District Court.

II. Legal Proceedings

A. Petition for Child Protection Order

If the Department worker believes a child would be in "jeopardy" absent the issuance of a court order, s/he may file a Petition for Child Protection Order with the District Court. The Act defines "jeopardy" as including serious abuse or neglect of the child as evidenced by: deprivation of food, clothing, supervision or care; abandonment; serious physical or emotional injury or the threat thereof; or sexual abuse. 22 M.R.S.A. ¤4002(6). The Act specifies what information must be contained in the Petition, including basic information about the child, a summary statement of the facts upon which the Department bases its Petition, a request for specific relief from the court, and an admonition that proceedings could ultimately lead to termination of parental rights. The Department's worker files the Petition with the District Court and arranges service on the parents and custodians. The court clerk assigns a hearing date which is inserted in the Petition prior to service.

In some cases, the Department caseworker may believe that a child is in "immediate risk of serious harm", a situation distinguishable from "jeopardy" both in the level of harm and exigency. In those cases, the worker may file a Petition for Child Protection Order and add a Request for a Preliminary Protection Order (hereinafter a "PPO"). The Request for a PPO must be supported by an affidavit setting out the facts that establish immediate risk. 22 M.R.S.A. ¤4034. The Petition and Request are presented to a judge for her/his consideration, often ex parte. Although jurisdiction over child protection cases rests with the District Court, a Request for a PPO may also be presented to a Superior Court or Probate Court judge. 22 M.R.S.A. ¤4031(B). In a Request for a PPO, the Department generally asks for temporary custody of the child, although it may ask for any of the dispositional alternatives outlined in the Act. 22 M.R.S.A. ¤¤4034(2) and 4036. Copies of all the pleadings and the Order of Preliminary Protection, if granted, must be served on the parents and custodians.

¥ Case Example: A baby is admitted to a hospital emergency room with a fractured skull. The attending physician diagnoses the fracture as an inflicted injury. The only explanation which the parents offer is that the baby rolled off the sofa onto the rug, a scenario which the doctor maintains cannot explain the injury. The parents were the only individuals with access to the child. Because the injury is serious and not adequately explained, the child is young, and the

parents are the caretakers to whom the child would be discharged, the baby is at immediate risk of serious physical injury. The caseworker would draft an Affidavit swearing to the facts, attach it to a Request for a PPO, and present it to a judge.

Parents and legal custodians are entitled to legal counsel in child-protection cases, a right which must be prominently noted on the Petition for Child Protection Order. 22 M.R.S.A. ¤4005(2). Counsel must be provided at no cost to indigent parents (denominated "Respondents," not "Defendants"). At the time the Petition is filed, the court now appoints counsel for all parents and custodians identified in the Petition, provided the Petition indicates a known address for that party. That automatic appointment of counsel is subject to subsequent filing of a financial affidavit by the party and the court's determination that the party is eligible for continued representation. Counsel for parents are appointed from a list of attorneys maintained by the District Court Clerk. Lawyers interested in court-appointed work should ask that their names be added to that list.

The court also appoints a representative for the child in the proceedings; that individual is the Guardian ad litem. The Guardian's job is to investigate the child's circumstances and make recommendations for disposition that are in the child's best interest. The Guardian is a full party to the litigation; s/he is allowed to cross examine witnesses called by the other parties, subpoena and call witnesses, and participate in negotiations. In addition, the Guardian is required to file a written report with the court outlining her/his investigation, findings, recommendations, and wishes of the child. 22 M.R.S.A. ¤4005(1). The Guardian may be a court-appointed attorney or a volunteer from the Court-Appointed Special Advocate (CASA) Program. The CASA Program has operated in Maine for many years, and has trained and supported hundreds of volunteers.

B. The Summary Preliminary Hearing

If the court grants a PPO, a summary preliminary hearing must be scheduled within ten days.

The summary preliminary hearing is a matter of right for the custodial parent. If a non-custodial parent desires a full hearing, s/he may request one. 22 M.R.S.A. ¤4034(4). A parent may elect to waive the summary preliminary hearing. A written waiver must be signed by the parent) in the presence of a judge, who must find that it has been executed knowingly and voluntarily.

22 M.R.S.A. ¤ 4034(3). If there is no waiver, the hearing must be held.

The Department has the burden of proof and must demonstrate that the child is in immediate risk of serious harm. At the summary preliminary hearing, the judge may limit testimony to that of the caseworker, parent, custodian, guardian ad litem, foster parent, preadoptive parent or relative providing care. The court may also admit evidence that would otherwise be inadmissible as hearsay; that may include affidavits from school personnel, medical reports, even the notes of the caseworker. 22 M.R.S.A. ¤4034(4).

Sometimes a parent can formulate a protective plan for the child between the time the PPO issues and the summary preliminary hearing is held which removes the immediate risk of serious harm.

¥ Case Example: A child tells her teacher that her mother's boyfriend sexually abuses her. The teacher, a mandated reporter, informs the Department which obtains a PPO and removes the child from the home the mother shares with her boyfriend. At the summary hearing on the PPO,

the mother establishes that her boyfriend is gone and will not return. She also agrees to be supervised at home by her sister, who teaches parenting classes, and notes that she has enrolled herself and her child in counseling. The judge determines that the parent intends to follow the plan and keep her child safe and dissolves the PPO, returning custody of the child to the mother. A hearing on the underlying Petition for Child Protection Order, however, remains scheduled.

If the court finds that the Department has proven, by a preponderance of the evidence, that the child is in immediate risk of serious harm, it may continue the child in the temporary custody of the Department until the final hearing on the Petition for Child Protection Order. Or the Judge may order any other protection for the child available under the Act as a disposition. Those options include returning custody to the parents with conditions, directing the Department to supervise the child, requiring the family to accept treatment services, or removing a perpetrator from the home. 22 M.R.S.A. ¤4036 (1)(A-H). The court may not order custody to the Department and require placement of the child with the parent. 22 M.R.S.A. ¤4036(4). It is very common for a PPO to direct the parents to undergo psychological and/or substance abuse evaluations. 22 M.R.S.A. ¤4036. An Order after a summary preliminary hearing is an interlocutory decree which is not appealable.

C. Hearing on the Petition for Child Protection Order

Upon the filing of a Petition for Child Protection Order, regardless of whether or not that Petition is accompanied by a Request for a PPO, the court must ensure that the hearing on the Petition is scheduled in such a manner that the court issues its order within 120 days of the filing. 22 M.R.S.A. ¤4035(4-A). To ensure compliance with that requirement and to facilitate resolution of these matters, a Case Management Conference is held within thirty days of the filing. All parties and counsel are required to be present for and participate in that Case Management Conference. The Case Management Conference is conducted by the judge in the courtroom and is recorded. Counsel are expected to be familiar with the case and prepared to identify issues, discuss proposed stipulations, and estimate numbers of witnesses and time required for trial. The judge is actively engaged in efforts to resolve the matter, if possible, or to refine the issues for trial. If the parties are able to reach a full agreement, that proposal is reviewed by the judge. If s/he accepts it, the order is recited on the record, in the presence of all parties and counsel, and subsequently reduced to writing. If the matter cannot be resolved, a trial date is assigned before the Case Management Conference is recessed.

At the hearing on the Petition for Child Protection Order, also known as the jeopardy hearing, the Department has the burden of proving by a preponderance of the evidence that the child is in circumstances of jeopardy to her/his health or welfare. If the hearing cannot be completed on the date(s) assigned, the matter must be set for further hearing within fourteen days from the date of recess. If the court determines that the child would be in jeopardy without the issuance of an order, it enters a Child Protection Order detailing its findings and defining the nature of the jeopardy. The court must then fashion a disposition from the alternatives provided in the Act. 22 M.R.S.A. ¤4036. Although the Act contemplates that this stage of the proceedings is separate from the earlier adjudicatory phase, allowing for the submission of written and oral reports on the issue of disposition, in practice such formal bifurcation is rare. The court will also enter findings about whether the parents can pay child support if the child is placed in the Department's custody, and if so, how much they should pay. A child support order is based upon information which the parents must submit by filing income affidavits as required by law. 22 M.R.S.A. ¤4007(6). It is the custom in most venues for the presiding judge to render a decision from the bench, and ask the Assistant Attorney General to draft the Order. That draft is then circulated to the parties before being submitted to the judge for signature.

In most cases in which a child is placed in the custody of the Department, the court requires that the parties engage in reunification efforts. The Department is required to present a proposed reunification plan to the parties and the court at the summary preliminary hearing or, if no PPO has been issued, within 10 days of the filing of the Petition. 22 M.R.S.A. ¤4041(1)(C-1). The court may conduct a summary hearing on the contents of a reunification plan; that hearing may be nontestimonial or may include testimony of the caseworker, parent, guardian ad litem, foster parents, and/or relatives providing care.

A Child Protection Order, also called a Jeopardy Order, is a final judgment and as such, may be appealed. These appeals go directly to the Supreme Judicial Court sitting as the Law Court, and are expedited. 22 M.R.S.A. ¤4006.

D. Judicial Review of a Child Protection Order

Once a judge issues a Child Protection Order, both Federal and State law require that the child's circumstances be reviewed periodically by the court. State law requires that the Order be judicially reviewed every 6 months. 22 M.R.S.A. ¤4038. Judicial Reviews may be held more frequently by agreement of the parties or order of the court. A Judicial Review is an opportunity for the court to ensure that the parents and the Department are carrying out their responsibilities under the Order, and to amend those requirements as appropriate. The respective responsibilities of the parents and the Department are set forth in the Act. 22 M.R.S.A. ¤4041. Except in certain cases in which the Court finds aggravating factors and does not require reunification efforts, the Department must develop a plan to rehabilitate and reunify the family, and offer specific services to ameliorate the conditions of jeopardy. The parents must fully participate in rehabilitation and reunification efforts, and effect such changes as will ensure that their child will be safe in their care and custody.

If the Department wishes to cease reunification efforts, it must send written notice of that decision to the parent at her/his last known address. The notice must identify the reasons for the decision, the specific efforts that the Department has made, and a statement of the parent's right to request a Judicial Review. 22 M.R.S.A. ¤4041(2)(B-1). Within 10 days of sending that notice, the Department must file a Motion, with supporting affidavits, seeking approval of its decision. If the parent files a written objection to the Motion within 21 days, the Court must conduct a summary hearing on the issue. If the parent files no objection, the Court may conduct a summary hearing or decide the matter without further hearing.

Any party may file a Motion for a Judicial Review at any time, and the moving party has the burden of going forward. 22 M.R.S.A. ¤4038(2). However, before the court may enter an order returning the custody of the child to a parent, the parent must show that the parent has carried out her/his responsibilities to rehabilitate and reunify with the child. The parent must also show that s/he has resolved the problems that caused the child to be in jeopardy, and can protect the child from further jeopardy. 22 M.R.S.A. ¤4038(7-A)(B)(1)(a). In entering an Order after Judicial Review, the Court has the same dispositional options available as were available at the Jeopardy Hearing. 22 M.R.S.A. ¤¤ 4036 and 4038.

E. Permanency Planning Hearing

In every case in which a child has entered foster care, the court must conduct a permanency planning hearing for the child within 12 months of the child's entry into foster care, and every 12 months thereafter. 22 M.R.S.A. ¤4038 (7-A). A child is considered to have entered foster care on the date of

the first judicial finding of abuse or neglect or on the 60th day after removal from the home, whichever occurs first. At the permanency planning hearing, the court must decide if the child should be returned to the parent, placed for adoption, referred for legal guardianship or placed in another planned living arrangement. Often the permanency planning hearing will be joined with a Judicial Review hearing on the case.

If a court order includes a finding of an aggravating factor and an order to cease reunification, a permanency planning hearing must commence within 30 days. See 22 M.R.S.A. ¤¤ 4002(1B), 4034(4), 4036(G-2).

F. Petition for Termination of Parental Rights

If efforts to rehabilitate and reunify the family fail, the Department may file a Petition for Termination of Parental Rights. 22 M.R.S.A. ¤4050 et. seq. The Department must file such a petition if a child has been in foster care 15 of the most recent 22 months unless: the Department is required to undertake reunfication efforts and has not provided services to the family necessary for the child's safe return home; the Department has chosen to have the child cared for by a relative; or the Department documents to the court a compelling reason why filing a petition is not in the child's best interest. 22 M.R.S.A. ¤ 4052(2-A). At a hearing on a Petition for Termination, the Department has the burden of proving by clear and convincing evidence that termination is in the best interest of the child and that:

(i) the parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time which is reasonably calculated to meet the child's needs;

(ii) the parent has been unwilling or unable to take responsibility for the child within a time which is reasonably calculated to meet the child's needs;

(iii) the child has been abandoned; or

(iv) the parent has failed to make a good faith effort to rehabilitate and reunify with the child pursuant to section 4041.

22 MRSA ¤4055 (1) (B) (2) (a) and (b).

Most of the appeals to the Law Court in connection with child protection cases have been appeals from Termination of Parental Rights Orders. The content of those decisions is well beyond the scope of this Handbook but the parent's attorney must become familiar with that body of law. See, e.g., In re Christina H. (1992) Me., 618 A.2d 228; In re David G. (1995) Me., 659 A.2d 859; In re Ashley A. (1996) Me., 679 A.2d 86; In re Serena C. (1994) Me., 650 A.2d 1343; In re Charles Jason R. et. al. (1990) Me., 575 A.2d 1080.

The Law Court has elaborated upon certain pertinent considerations. "Clear and convincing" evidence is that which is "highly probable." In re Caroline M., (1990) Me., 576 A.2d 743. "A time reasonably calculated to meet the child's needs" means time as seen from the perspective of the child. In re Annette P., (1991) Me., 589 A.2d 924. The Law Court has also stated that reunification efforts made by the Department are not a separate element which must be established before a Petition for Termination of Parental Rights may be granted. In re Daniel C., (1984) Me., 480 A.2d 766.

Because so many Termination of Parental Rights appeals are based primarily upon "sufficiency of the evidence" claims, parent's counsel are advised that such claims are rarely upheld. The Law Court has repeatedly ruled that the trial court's findings are entitled to deference by the Law Court, In re Misty Lee H., (1987) Me., 529 A.2d 331; and will not be overturned even when there is conflicting competent evidence, because such conflict is appropriately resolved by the trial court. In re: Bradford B., (1985) Me., 500 A.2d 1390.

III. Special Considerations - Legal, Practical and Other

Representing parents in child protection actions is not an easy task. The emotional content of these cases is high, and the parents may be angry, depressed or afraid. Sometimes parents have serious problems of their own which may inhibit an attorney's ability to communicate with them. While some practitioners assume a "take no prisoners" approach to the case, many seasoned lawyers believe that child protection cases are best handled with rational discussion and reasonable negotiation.

Child protection proceedings are governed by the Maine Rules of Civil Procedure and the Maine Rules of Evidence, with some significant exceptions with which attorneys must be familiar. Several of these are described below. In addition, there are many unique facets of child protection proceedings about which every attorney must be aware when s/he embarks upon representation of a parents in such matters.

A. The child hearsay exception: 22 M.R.S.A.¤ 4007(2) permits the out-of-court statement of a child to be admitted into evidence through another person. For example, if a child discloses to his teacher that his grandfather touches him sexually, that statement may be admitted into evidence through the testimony of the teacher. The hearsay exception includes statements by a child other than the child who is the subject of the petition. For example, if Child A is living with a person who sexually molested Child B, the statements of Child B about the abuse can be admitted on the question of whether Child A is at risk because he is living with a perpetrator. In re Charles Jason R., et.al., (1990) Me., 575 A.2d 1080.

B. Abrogation of Privileges: Under 22 M.R.S.A. ¤ 4015, the husband/wife, doctor/patient, psychotherapist/client, and other privileges of confidentiality are abrogated in child protection proceedings. In fact, when parents have undertaken psychotherapy, it is not at all uncommon for the treating psychotherapist to be required to testify about the parents' issues and progress.

C. The child in court: The court has broad discretion on how to deal with child witnesses, particularly if the witness is the child who is the subject of the proceeding. The court may interview the child in chambers, with only the Guardian ad Litem and parents' counsel present, provided the interview is recorded. Or the court may have the child testify on the witness stand but remove the parents from the hearing room. In re Jo Nell C., (1985) Me., 493 A.2d 1053.

D. Confidentiality: All child protection hearings are confidential. This means that the hearing room is closed to outsiders when the hearing is in progress, and that the court's official record is unavailable to the public, absent an order of the court to the contrary. Similarly, all Departmental records are confidential, with some very limited exceptions and conditions. 22 M.R.S.A. ¤¤ 4007, 4008 and 4008-A.

E. Discovery: An attorney representing a parent is entitled to relevant information from the Department's case file. However, discovery practice in child protection cases differs from that in other

civil cases. There are several reasons for this, most of them practical.

Although it is the state's largest public agency, Departmental resources are burdened by a very high demand for child protection services. Every year thousands of children suspected of being abused or neglected are referred to the agency. Many of those referrals are "screened out" and some cases which should get attention do not receive it because there are insufficient staff resources.

In addition, the materials pertinent to a child protection case may be voluminous. Department files contain, among other documents, caseworker dictation and working notes; family records; child records; medical reports and psychological reports; substance abuse treatment records; criminal records and foster care information. Consequently, discovery practice common to other civil proceedings, such as interrogatories and depositions, are uncommon in child protection practice. Instead, the parents' attorneys and the Guardian ad Litem are given access to the case records at the local Department office, and the Department will make copies of relevant material.

F. Anonymity/prohibitions on disclosure: In reviewing discovery, an attorney may note that some documents appear to have been redacted. Occasionally, child abuse referents ask that their identity be protected. The Department must take all appropriate steps to honor those requests, and may de-identify parts of the record. 22 M.R.S.A. ¤ 4008(2)(D).

Similarly, some records are not routinely disclosed in the case file review. For example, a parent may have participated as a patient in a drug and alcohol rehabilitation program for 28 days, but there is no documentation of that involvement in the case file. Substance abuse treatment records are governed by very stringent Federal confidentiality laws which preclude the holder of the record to re-disclose it to anyone without a specific release or a court order.

Other examples of information in the file which may remain protected until releases are signed or court orders are issued include certain mental health treatment records (for example psychological evaluations of non-custodial parents or step-parents) and records of sexually transmitted disease, particularly HIV test results. There is also a statutory provision that prevents police records of ongoing criminal investigations from being disclosed. 16 M.R.S.A. ¤ 611.

G. Adverse inferences: In a child protection case, a parent may exercise his 5th Amendment right not to testify. However, as in other civil litigation, the Court may draw an adverse inference from that choice. In re Ryan M., (1986) Me., 513 A.2d 837.

H. Reasonable efforts determination: The Federal law governing state child protection initiatives is the Adoption Assistance and Child Welfare Act, 42 U.S.C. ¤¤ 620 et. seq., 670 et. seq. Among other things, this law sets forth certain standards that states are required to establish and maintain in order to receive Federal funds. Among those is a requirement that before a child can be removed from the custody of his parents, the state must make reasonable efforts to prevent the need to remove the child from the home. Likewise, once a child is removed and placed in foster care, the state must make reasonable efforts to rehabilitate and reunify the family. The findings contained in the order should support these conclusions.

What is "reasonable" will depend upon the circumstances of every case. For example, in a case where a child suffers serious inflicted physical injury while in the custody of his mother, the court may determine that it is reasonable for the Department to take immediate protective action and remove the child from the home. On the other hand, where circumstances suggest long term neglect (poor nutrition, poor hygiene) it may be more reasonable for the Department to try and work with the family to

teach better skills before removing the children.

I. Interviews of the children by the Department: A Department caseworker may interview children without giving prior notice to parents under certain limited circumstances, the most important of which is when the Department has reasonable grounds to believe that prior notice would increase the threat of serious harm to the child or to another person. 22 M.R.S.A. ¤4021(3).

J. Admissibility of reports of licensed mental health professionals: Written reports made by licensed mental health professionals who have treated or evaluated the child are admissible as evidence, provided that the party seeking to admit the report has furnished a copy of it to all parties at least 21 days prior to hearing. However, the report shall not be admitted without the testimony of the mental health professional if a party objects at least 7 days prior to the hearing. 22 M.R.S.A. ¤4007(3-A).

IV. Preparing the Case

Child protection litigation requires some specialized knowledge. The attorney must have a thorough grasp of the governing laws and rules, but equally important is a working knowledge of psychology, medicine, clinical social work, substance abuse treatment philosophies, and the dynamics of domestic abuse. Child protection cases include a great deal of testimony by experts, and experts are allowed to testify about the "ultimate issue" in the case. For example, a psychological examiner may be permitted to testify that a child is in jeopardy in the parent's care because the parent has an untreated personality disorder that results in behavior that would put the child at risk.

Parental capacity evaluations, often including psychological components, frequently are ordered in child protection cases, often at the request of the Department. Such evaluations may be agreed to or court-ordered at the summary preliminary hearing, so that psychological profile data is available for the hearing on the Petition for Child Protection Order. The evaluation is generally performed by a Ph.D. level psychologist or a psychiatrist specially trained in psychometric testing. In some cases, a parent has the right to request that a psychological evaluation be done by a person of her/his own choosing, separate from the evaluation arranged and paid for by the Department. A separate evaluation can be especially important in a hearing on a Petition for Termination of Parental Rights. In re Michael V., (1986) Me., 513 A.2d 287.

Evaluators use a combination of testing instruments and clinical interviews to obtain a profile. Instruments often used are the Minnesota Multiphase Personality Inventory (MMPI); the Rorschach Ink Blot Test; the Wechsler Adult Inventory (WAIS); the Million Clinical Multiaxial Inventory; the Thematic Apperception Test (TAT); and for children, the House-Tree-Person Projective Figure Drawing instrument.

While information about these tests is far beyond the scope of this handbook, there are books available and evaluators are usually glad to explain them to a new practitioner.

Psychological disorders are classified in a standard reference text called the Diagnostic and Statistical Manual of Mental Disorders (DSM), Revised. This text is now in its fourth edition and is referred to as "the DSM-IV." Attorneys who work on child protection cases should become familiar with the DSM-IV. In it, various mental disorders are described and differentiated from each other and then assigned a number. This classification is helpful, and familiarity with the system will assist in developing focused direct and cross-examination.

Many parents involved in child protection cases are referred to counseling programs during the course of the case. Therapy is thought to help parents gain insight into their particular problems and help them solve those problems. Therapeutic approaches are tremendously varied. An attorney should become familiar with the many therapeutic philosophies and approaches, not only to be prepared for trial but also to gauge whether the parent/client appears to be improving. If not, perhaps another approach can be suggested.

Evaluations of children can include developmental assessments, even on very young children. The aim of developmental testing is to determine if children have reached certain developmental states consistent with their ages. If not, it is important to know if the delay is attributable to inherent physical characteristics, or if there are factors in the child's environment that cause it to be delayed. An example of environmentally-related delay is the "failure to thrive" infant who does not gain weight, is listless and weak because it is not being nurtured.

Child protection cases can contain a great deal of medical data with which a lawyer should become familiar. Some of the cases may involve very rare phenomena, such as Munchausen's Syndrome by Proxy in which a parent injures a child in order to seek medical attention and "save" it. Much more common are burns, head injuries, and broken bones. With these, the most important issue at trial is invariably whether the injuries were accidental or inflicted. Medical science has developed widely-accepted diagnostic approaches that may identify whether an injury was accidental or inflicted. A parent's attorney should be familiar with these diagnoses. Equally common are cases involving sexual abuse. Cases in which sexual abuse is alleged but there is no physical evidence such as scarring or tearing are common, but much more complex to evaluate than those in which there are physical symptoms. This is a rapidly-evolving field.

IV. Managing the Case

Child Protection cases can be extremely time-consuming. However, there are some ways you can manage the case for efficiency and still maintain effectiveness.

A. Avoiding duplication: Child protection proceedings are "unitary" in nature; that is, each stage is part of the whole. Evidence taken at a summary preliminary hearing, for example, may be regarded as one piece of a larger inquiry to be resolved at a final hearing on the Petition for Child Protection Order. For that reason, evidence submitted at the summary preliminary hearing is part of the record and may not need to be repeated at the hearing on the Petition for Child Protection Order.

Asking for detailed findings in the Child Protection Order also prevents the need to reproduce the entire case once again on subsequent Judicial Reviews. Recall that Child Protection Orders are final judgments. The facts found in the Child Protection Order form the basis for all the rehabilitation and reunification efforts that are to come. Consequently, on Judicial Review, jeopardy is no longer an issue. Much time can be saved on Judicial Reviews when parties do not spend time relitigating the Petition for Child Protection Order hearing, but instead focus on rehabilitation and reunification.

B. Making use of documentary evidence: Trial time may be reduced by the efficacious use of documentary evidence in place of live testimony. While there will be instances when an attorney will want witnesses available for cross-examination, they should consider the need for them to testify in full as to the contents of a report they have written. A stipulation may suffice. Other records may be allowed into evidence without the need for a custodian to testify about their authenticity. For example, certified copies of medical records from licensed hospitals may be admitted without testimony pursuant

to 16 M.R.S.A. ¤357.

Keep in mind, however, that the documents produced throughout the life of a child protection case can be voluminous. Many reports duplicate information contained in other reports. It is extremely helpful to the presiding judge if counsel identify those portions of the record that are important to the case. Such "highlighting" streamlines the decision-making process.

C. Communicating with other parties: A parent's attorney should communicate freely with the Guardian ad Litem and with other parties to keep track of what is happening in the case. This is especially true after the Child Protection Order is entered. If the Order places the child in the custody of the Department, it will also specify what efforts must be undertaken by the parties for reunification. It is imperative that counsel monitor progress in obtaining and complying with the services.

As the child's legal custodian, the Department stands in the shoes of a parent and makes necessary decisions for the care of the child. The Department will place the child in a foster home or other residential placement, enroll him in school, arrange for medical and therapy services, provide some clothing and otherwise make necessary decisions. It is important to maintain reasonable lines of communication with the Department once the child is in foster care, because the child may be moved from placement to placement.

One unique feature of child protection litigation is that parents must communicate with the Department caseworker in order to participate in a rehabilitation and reunification plan. Some new attorneys are uncomfortable with this notion because the Department is the "adverse party" in the litigation, and therefore believe that all communications between the parties (i.e. between the parent and the caseworker) should go through their attorneys. However, when attorneys direct their clients not to talk to the Department without the attorney being present, the reunification process slows down and can become unnecessarily complicated. While advocating for a client by talking with the Assistant Attorney General may be productive, it is not the sole method of resolving problems. Parent's lawyers routinely contact the Department's caseworkers to discuss the progress of the case or negotiate problem areas.

Keeping in touch with the Guardian ad Litem is also important. The Guardian's role is to speak on behalf of the best interest of the child. To do that, a Guardian must do an independent assessment of the child's circumstances on a regular basis and form opinions about what is preferable for the child. A good Guardian can provide information and recommendations to all counsel so they can better assist their clients.

D. Reunification efforts - 22 M.R.S.A. ¤ 4041: Keeping in touch with the parties means keeping track of reunification efforts. In every case where the child comes into foster care, the Department must establish a plan of rehabilitation and reunification. The parents have a responsibility to engage in the plan, and make best efforts to rehabilitate and learn to protect their children from jeopardy. Parents' attorneys should be aware of what the plan is, and should confer regularly with their clients on progress and difficulties.

Once a parent has demonstrated that s/he has addressed the problems that gave rise to jeopardy in the first place, and can protect the child, the Department will begin plans for the return home. Usually the Department will establish a trial placement at home. The Children's Services caseworker should check in with the child regularly during the trial placement, keep in touch with the parents and ensure that the child is safe. If, after a period of time the placement is working, the Department will file a Motion for Judicial Review asking the court to dismiss the Child Protection Petition.

Once that occurs, legal custody reverts to the parents and the case is over.

E. Case Management Conferences: In order to manage a busy child protective docket, the District Court has established a case management system for those cases. By means of case management conferences, judges can provide oversight to the cases and move them along to resolution. The case management conference can be a forum to request that the judge take action when other efforts have failed. Sometimes this means that the judge directs the Department to work more quickly than it has, and sometimes it means that the judge encourages or cautions the parents to take action. A Case Management Conference is always conducted within 30 days of the filing of a Petition for Child Protection Order; in addition, such a conference may be scheduled by the court at any point during the case where the judge determines it would be beneficial. At other points, the judge may direct that the parties meet for a pretrial conference or a conference of counsel to move the case along.

V. Miscellaneous

Although Child Protection Petitions are usually filed by the Department, the Act also authorizes a police officer or sheriff to petition the court. A petition may also be filed by "three or more persons," allowing for private parties to file. 22 M.R.S.A. ¤4032.

The Act also authorizes Medical Treatment Orders, in which the Department, a physician or a chief medical administrator of a hospital may request a court order directing medical treatment of a child. Persons seeking medical treatment orders must attempt to notify the parents of their intent. Medical treatment orders may issue if the child's custodians are unable or unwilling to consent to it, and the treatment is necessary to treat or prevent an immediate risk of serious injury. 22 M.R.S.A. ¤4071.

The Department and law enforcement officials will sometimes take joint action for brief periods of time. Pursuant to 15 M.R.S.A. ¤ 3501 law enforcement officials may detain a child (often a runaway) for up to 6 hours. During this period, the Department will often try to make plans for the care of the child.

In addition to the Act, the parent's attorney should also be familiar with some other related laws. These are discussed briefly below.

A. Juvenile Commitment, 15 M.R.S.A. ¤3314: Title 15 is the Juvenile Code, and sets out the procedures for dealing with children who commit acts which, if they were committed by an adult, would be considered criminal. This section authorizes the juvenile court to commit a juvenile to the custody of the Department. A case of this kind also requires periodic Judicial Review.

B. Interim Care of Runaways, 15 M.R.S.A. ¤3501 et. seq.: This section authorizes the so-called six-hour hold referenced above.

C. Uniform Child Custody Jurisdiction Act, 19-A M.R.S.A. ¤1701 et. seq.: This statute sets forth considerations for determining custodial rights and responsibilities between parents who live in different states.

D. Indian Child Welfare Act, 25 U.S.C. ¤1901: This act applies to child actions involving children who are members of recognized Native American tribes. The standard of proof pursuant to this statute is "clear and convincing" for hearing on a Petition for Child Protection and "beyond a reasonable doubt" for hearing on a Petition for Termination of Parental Rights.

E. Protection from Abuse Act, 19-A M.R.S.A. ¤4001 et. seq.: Actions pursuant to this statute allow the entry of court orders to protect family members from abuse. Under certain circumstances, the court may issue emergency orders ex parte.

F. Interstate Compact on Placement of Children, 22 M.R.S.A. ¤4191 et. seq.: This Compact is an agreement among the states authorizing state child protection agencies to conduct home studies of a parent on behalf of another state. It frequently appears in child protection cases where one parent lives in a state other than Maine. For example, a child is found to be in jeopardy in the custody of his mother in Maine. The child's father lives in Vermont. Utilizing the Interstate Compact, the Maine Department may ask the comparable Vermont agency to conduct a home study of the father and report back to Maine. Maine may place the child with his parent in Vermont only if Vermont authorizes such placement.

CONCLUSION

This Handbook has been intended to serve as a basic guide for attorneys who represent parents in child protection matters. No brief manual such as this can take the place of study and experience. Because of the complexity of child protection cases, new practitioners are strongly urged to find an experienced attorney to act as a mentor before undertaking to represent parents.

Prepared by the
Maine Court Improvement Project

Printed by the
Administrative Office of the Courts